

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division**

ELIZABETH SINES, SETH WISPELWEY,
MARISSA BLAIR, TYLER MAGILL, APRIL
MUNIZ, HANNAH PEARCE, MARCUS
MARTIN, NATALIE ROMERO, CHELSEA
ALVARADO, and JOHN DOE,

Plaintiffs,

v.

JASON KESSLER, RICHARD SPENCER,
CHRISTOPHER CANTWELL, JAMES
ALEX FIELDS, JR., VANGUARD
AMERICA, ANDREW ANGLIN,
MOONBASE HOLDINGS, LLC, ROBERT
“AZZMADOR” RAY, NATHAN DAMIGO,
ELLIOT KLINE a/k/a/ ELI MOSLEY,
IDENTITY EVROPA, MATTHEW
HEIMBACH, MATTHEW PARROTT a/k/a
DAVID MATTHEW PARROTT,
TRADITIONALIST WORKER PARTY,
MICHAEL HILL, MICHAEL TUBBS,
LEAGUE OF THE SOUTH, JEFF SCHOEP,
NATIONAL SOCIALIST MOVEMENT,
NATIONALIST FRONT, AUGUSTUS SOL
INVICTUS, FRATERNAL ORDER OF THE
ALT-KNIGHTS, MICHAEL “ENOCH”
PEINOVICH, LOYAL WHITE KNIGHTS OF
THE KU KLUX KLAN, and EAST COAST
KNIGHTS OF THE KU KLUX KLAN a/k/a
EAST COAST KNIGHTS OF THE TRUE
INVISIBLE EMPIRE,

Defendants.

Civil Action No. 3:17-cv-00072-NKM

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF TYLER MAGILL’S
MOTION TO WITHDRAW AND VOLUNTARILY DISMISS HIS CLAIMS WITHOUT
PREJUDICE**

Plaintiff Tyler Magill respectfully submits this memorandum in support of his motion to withdraw and voluntarily dismiss his claims without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

In January 2019, attorneys for Plaintiffs informed Mr. Magill that a conflict had arisen between their representation of Mr. Magill and their representation of the other Plaintiffs, and that as a result, they could no longer represent him. (*See* Magill Aff. ¶ 2.) Mr. Magill was encouraged to consult with separate counsel to decide whether he wanted to continue to be involved as a plaintiff in this litigation. Mr. Magill subsequently sought counsel from a separate attorney regarding proceeding with the matter. (*Id.* ¶ 3.) After careful consideration and consultation with that attorney, Mr. Magill has determined that he wishes to withdraw from this case and voluntarily dismiss his claims. (*Id.* ¶ 4.)

Given that Mr. Magill seeks to withdraw before his deposition has even been scheduled and long before a motion for summary judgment has been filed, it is hard to imagine a colorable argument that Defendants will be prejudiced by Mr. Magill's withdrawal at this stage in any way. Accordingly, the Court should grant the instant motion permitting Mr. Magill to voluntarily withdraw.

ARGUMENT

A. Legal Standard

Rule 41(a)(2) provides that “an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. ... Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.” Fed. R. Civ. P. 41(a)(2).¹

¹ While we recognize that voluntary dismissal is also available without court order by filing “a stipulation of dismissal signed by *all* parties who have appeared,” Fed. R. Civ. P. 41(a)(1)(A)(ii) (emphasis added), as the Court is aware, there are numerous *pro se* Defendants who have been unresponsive at every stage of this litigation. Although Plaintiffs have no reason to believe any defendant would object to this particular motion, we believed it to be more

According to the United States Court of Appeals for the Fourth Circuit, the purpose of Rule 41(a)(2) is to freely “allow voluntary dismissals unless the parties will be unfairly prejudiced. ... [T]hus, a district court should grant a Rule 41(a)(2) motion ‘absent plain legal prejudice to the defendant,’” *Bridge Oil, Ltd. v. Green Pac. A/S*, 321 F. App’x 244, 245 (4th Cir. 2008) (internal citations omitted). In this regard, the prejudice must be substantial — “[a] defendant cannot establish prejudice sufficient to defeat a Rule 41(a)(2) motion merely by showing that it has filed a summary judgment motion ... or that it faces the prospect of a subsequent lawsuit.” *Id.* (internal citations and quotations omitted). As a result, the factors that a district court should consider in ruling on such motions include: “(1) the opposing party’s effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the movant; (3) insufficient explanation of the need for a dismissal; and (4) the present stage of the litigation, *i.e.*, whether a motion for summary judgment is pending.” *Gross v. Spies*, 133 F.3d 914 at *5 (4th Cir. 1998) (table decision).

B. Defendants Will not be Prejudiced by Mr. Magill’s Withdrawal.

As discussed below, each of the *Gross* factors weigh heavily in favor of granting the instant motion allowing Mr. Magill to withdraw and voluntarily dismiss his claims.

First, this case involves multiple plaintiffs, each with identical claims against the defendants. While Defendants have responded to Plaintiffs’ claims in the litigation, it is hard to imagine how Mr. Magill’s presence in the case as one of ten plaintiffs asserting the same causes of action has led to any significant marginal increase in time and effort by Defendants to date, particularly in light of the fact that Mr. Magill’s deposition has not been scheduled. In other words, Defendants’ efforts would likely have been performed even without Mr. Magill’s presence in this case. *See Bridge Oil*, 321 F. App’x at 245–46 (“[A]lthough some discovery had taken place, it

efficient to seek this order directly from the Court, rather than attempt to obtain stipulations from parties who have been uncooperative.

was minimal and would have occurred in the multi-party litigation even without the presence of Bridge Oil's ... claim."). This clearly is not a situation where "voluntary dismissal potentially unravels the effect of an earlier legal ruling," *RMD Concessions, L.L.C. v. Westfield Corp., Inc.*, 194 F.R.D. 241, 243 (E.D. Va. 2000), or where discovery has closed and a dispositive order is "imminent," *Miller v. Terramite Corp.*, 114 F. App'x 536, 540 (4th Cir. 2004); *see also Howard v. Inova Health Care Servs.*, 302 F. App'x 166, 178–80 (4th Cir. 2008) (noting "plaintiff's motion came after a lengthy discovery period and merely one week before the scheduled trial date ... with motivation for the motion appeared to be to circumvent a discovery ruling, which counsel could have avoided by deposing the witness within the discovery period" (citing *Francis v. Ingles*, 1 F. App'x 152, 154 (4th Cir. 2001) (internal quotations omitted))).

Second, Mr. Magill moved diligently to voluntarily dismiss within weeks of learning that his attorneys had a conflict in representing him. In that time, he expeditiously connected and consulted with separate counsel before deciding to withdraw. This motion is being filed shortly after Mr. Magill made that decision. *See Fid. Bank PLC v. N. Fox Shipping N.V.*, 242 F. App'x 84, 89 (4th Cir. 2007) ("Fidelity was not dilatory in making its motion; it moved immediately"). Indeed, Mr. Magill "has diligently participated in this litigation, and thus, has not caused excessive delay or lack of diligence." *Vosburgh v. Indem. Ins. Co. of N. Am.*, 217 F.R.D. 384, 387 (S.D.W. Va. 2003).

Third, Mr. Magill has adequately explained his reasons for withdrawal: namely, after a conflict arose between him and co-Plaintiffs' counsel,² he consulted separate legal counsel and decided to withdraw from the case. (*See Block Aff.*; *Magill Aff.*) The courts have previously

² The nature of the conflict is the subject of privileged, attorney-client communications. *See, e.g., Marketel Media, Inc. v. Mediapotamus, Inc.*, No. 5:13-CV-427-D, 2015 WL 3650765, at *4 (E.D.N.C. June 11, 2015) ("[T]he fact that an attorney has a conflict of interest does not mean that the client forfeits the benefit of the attorney-client privilege." (emphasis and alterations in original) (internal citation omitted))).

recognized the existence of a conflict as constituting an adequate basis for withdrawal. *See, e.g., Blake v. Rubenstein*, No. CV 2:08-0906, 2016 WL 5660355, at *6 (S.D.W. Va. Apr. 5, 2016) (granting motion to withdraw where Plaintiff affirmed that “conflict[s] have arisen between me and some of the co-plaintiffs.”); *Chidester v. McCormick*, No. CIV.A.5:06-CV-00173, 2008 WL 4279377, at *1 (S.D.W. Va. Sept. 11, 2008) (granting motion to withdraw where “Plaintiff states that ‘due to interpersonal conflicts’ he is unable to prosecute his cause of action”).

Finally, Mr. Magill does not submit this motion in order to avoid a ruling on a dispositive motion, since no dispositive motions, including motions for summary judgment have been filed. *Contra Howard*, 302 F. App’x at 178–80 (affirming denial of motion to withdraw after summary judgment motions had been filed); *True v. Seppala*, No. 2:13-CV-2228 DCN, 2015 WL 4937298, at *3–4 (D.S.C. Aug. 17, 2015) (denying motion to withdraw after Plaintiff failed to respond to motion for summary judgment). Accordingly, Defendants will not be prejudiced in granting Mr. Magill’s motion to withdraw and voluntarily dismiss his claims.

CONCLUSION

For the foregoing reasons, Mr. Magill respectfully request that the Court grant his motion to withdraw and voluntarily dismiss his claims without prejudice pursuant to Rule 41(a)(2).

Dated: February 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2019, the foregoing was filed with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to:

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I further hereby certify that on February 7, 2019, I also served the following non-ECF participants, via U.S. mail, First Class and postage prepaid, addressed as follows:

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I further hereby certify that on February 7, 2019, I also served the following non-ECF participants, via electronic mail, as follows:

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